(2)

No. 09-1207

Supreme Court, U.S.
MAY 6 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SUPPLEMENTAL BRIEF AND APPENDIX

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

PURPOSE OF THIS SUPPLEMENTAL BRIEF

Joseph Carson is pro se in this, his first (and hopefully only), case at the Supreme Court. He was informed by the Clerk's office last week that he could file a supplemental brief to the Solicitor General's waiver. The purpose of this filing is to provide additional information to the Court about the actions he has taken to persuade the President, the Secretary of Energy, the Chairman of the Merit Systems Protection Board, and/or the Solicitor General, if the Court invites a response to his petition, to file a response of acquiescence.

On April 8, 2010, shortly after his petition was docketed, Max Smith, the Shop Steward of the federal employee union – Office and Professional Employees International Union (OPIEU), to which Mr. Carson belongs – wrote the Secretary of Energy requesting he support the Solicitor General filing a response of acquiescence, App. 1-3. Mr. Carson, on April 11, 2010, wrote to the Solicitor General with a similar request, App. 4-6. On April 14, the Solicitor General responded to Mr. Carson's letter and petition with a letter, App. 7, notifying him of her decision to file a waiver.

On April 26, 2010, Mr. Carson wrote to the President, requesting he direct the Solicitor General to withdraw the waiver and file a response in acquiescence, for a variety of reasons, App. 9-19. The National Whistleblower Center, a major whistleblower advocacy group, has started an "action alert" campaign, intended to persuade the President and

Solicitor General to file a response in acquiescence, if this Court invites a response.[1]

Mr. Carson is named for a NYC fireman, his grandfather, who served at Ladder Co. 42 on Prospect Avenue in the Bronx for 20 years. By his desk he keeps the picture and NY Times profile of Fireman Peter Bielfeld, the only casualty from Ladder Co. 42 on 9/11. Fireman Bielfeld was home on disability leave on 9/11. He saw the attack and self-deployed to the World Trade Center, where he died.

No one would have criticized him had he not shown up on 9/11. But he would have known that he "looked the other way," instead of doing his professional duty to protect others, despite the obvious risks. Similarly, no one would have criticized Mr. Carson if he had not "blown whistles" about the serious workplace health and safety issues he uncovered, after they were suppressed by his management. But he would have known he "looked the other way," instead of doing his professional duty to protect others, despite the risks.

---

[1] See http://capwiz.com/whistleblowers/home/

Mr. Carson earnestly hopes this Court decides his petition warrants a response from the Solicitor General.

Respectfully submitted,

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831
Pro Se

Office and Professional Employees
International Union, A.F.L.-C.I.O. Local 2001

Phillip Pope, President

411 S. Gay Street, Suite D (865) 637-6547 (Phone)
Knoxville, TN 37902 (865) 637-6548 (Fax)

April 8, 2010

The Honorable Dr. Steven Chu
Secretary of the U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

RE: **Request for Support in Mr. Joe Carson's Supreme Court Case**

Dear Secretary Chu:

The Office and Professional Employees International Union, AFL-CIO, Local 2001 (OPEIU), represents the Department of Energy's (DOE's) bargaining unit employees at the Oak Ridge Office and the Office of Scientific and Technical Information. OPEIU supports and is asking that DOE request the Solicitor General to file a brief supporting Mr. Joseph P. Carson in his pending petition to the Supreme Court of the United States.

There are several reasons OPEIU supports the actions requested in Mr. Carson's brief, including:

- Currently, the lack of case law by the Federal Circuit relating to the 1994 amendment to the Whistleblower Protection Act of 1989, which added "any other significant change in

duties, responsibilities, or working conditions" to be included as "personnel actions," leaves a chasm for biased interpretation. OPEIU believes this should be corrected to provide specificity to the meaning and intent of the 1994 amendment.

- The Supreme Court decision in *Burlington v. White*, 126 S.Ct. 2405 (2006) is likely relevant to determining when an agency action becomes a "personnel action" by creating "any other significant change in duties, responsibilities, or working conditions." Albeit decided by the Supreme Court, this case was brought under the Title VII umbrella. Since this decision, it has been argued that this case is not specifically applicable to Title V. OPEIU believes this decision should also be applicable to all federal employees.

- The U.S. Office of Special Counsel, the primary bulwark to protect federal employees from Prohibited Personnel Practices (PPP's), has apparently been using the absence of case law at the Federal Circuit to presumptively determine that it does not have jurisdiction for PPP complaints alleging this type of personnel action, i.e., that whatever agency action is alleged, said action did not create "any other significant change in duties, responsibilities, or working conditions."

- Such precedent would aid DOE's compliance, and specifically your statutory duty to "prevent PPP's."

- Such precedent could be cited by arbiters, regardless of whose favor the arbitration is decided, as an integral part of the negotiated grievance process.

As Secretarial policy has declared for many years, DOE employees must be adequately protected from reprisal for the overall good of DOE's missions. After reviewing Mr. Carson's Petition for a Writ of Certiorari, OPEIU believes that his petition to the Supreme Court is intended to provide definition and clarity to a nebulous area of the law. OPEIU further believes that the resolution of this matter will work to the benefit of both federal agencies and unions across the country. OPEIU therefore respectfully requests that DOE join in support of Mr. Carson's petition by requesting the Solicitor General to file a brief 'in acquiescence.'

Sincerely,

/s/ R. Max Smith
R. Max Smith, P.E.
Shop Chair
Office and Professional Employees
International Union, AFL-CIO,
Local 2001
Post Office Box 2001; Mail Stop EM-91
Oak Ridge, Tennessee 37831
E-mail: SmithRM@oro.doe.gov

April 11, 2010

Honorable Elena Kagan
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

Via: fax, email, and overnight delivery (on April 12, 2010)

Re: *Carson v. Merit Systems Protection Board*, No. 09-1207, docketed at Supreme Court on April 6, 2010; request for an "acquiescence"

Dear Solicitor General Kagan,

For reasons stated in my petition of writ of certiorari as well as in the accompanying letters and documents, I respectfully request your office file an "acquiescence" agreeing that the matter merits review by the U.S. Supreme Court.

President Obama, as both a candidate and as President, has supported increased protection for federal whistleblowers. This is a jurisdictional case – in its response to my individual right of action (IRA) whistleblower appeal to the Merit Systems Protection Board (MSPB), the Department of Energy (DOE) complied with MSPB regulation by agreeing that the involved agency actions occurred. (I have also enclosed the "corresponding brief on CD-ROM" which I created per Fed. Cir. R. 32(e), it includes the joint

appendix, the relevant pages from the agency's response to MSPB are cited in my brief to the Supreme Court).

It is a legal fact that I am a whistleblower who suffered various forms of unlawful reprisal. The question is whether the agency actions cited in this appeal are "personnel actions" for creating "any other significant change in duties, responsibilities, or working conditions."

Determining whether an agency action becomes such a personnel action is ***still*** unreviewed at the Federal Circuit, 16 years after this "catch-all" category of personnel action was created. Additionally, there is no precedent at the MSPB whether the Supreme Court precedent in *Burlington v. White*, 126 S.Ct 2405 (2006) is relevant this determination.

I hope you will agree the Administration's repeatedly stated objectives to improve federal whistleblower protection can be advanced by this case, if the Supreme Court remands it to the Federal Circuit with appropriate instructions. I also hope a significant number of stakeholders to a trustworthy federal civil service will contact your office and/or the White House in support of this request. I understand that your office only has until April 26, 2010 to file an acquiescence, per Supreme Court Rule 12.6.

Respectfully,

Joseph P. Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

copy:

Norm Eisen, President Obama's Special Counsel for Ethics and Government Reform

Attachments:

My April 3, 2010 letter to DOE Secretary Chu

My April 6, 2010 letter to MSPB Chairman Grundmann

OPEIU (a federal employee union) April 8, 2010 letter to DOE Secretary Chu

Then-Senator Obama's May 2007 response to survey on federal whistleblower protection

Corresponding brief on CD-ROM for the underlying case at Federal Circuit, *Carson v. MSPB*, docket no. 2007-3134

[Seal] **U.S. Department of Justice**
Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

April 14, 2010

Mr. Joseph P. Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934

Re: *Joseph P. Carson v. Merit Systems Protection Board, S.Ct. No. 09-1207*

Dear Mr. Carson:

This is in response to your letter of April 11, 2010, requesting that the United States acquiescence in the above-captioned case.

After careful review of the petition our office has decided the United States will not file a response. If the Court disagrees, and wishes to hear our views on the merits of your petition, it will ask for a response from the government, which will, of course, be provided.

Sincerely,

/s/ Elena Kagan [as]
Elena Kagan
Solicitor General

Attachment

IN THE SUPREME COURT
OF THE UNITED STATES

CARSON, JOSEPH P.
Petitioner

vs.

MERIT SYSTEMS PROTECTION BOARD

No. 09-1207

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

ELENA KAGAN
Solicitor General
Counsel of Record

April 14, 2010

cc: JOSEPH P. CARSON
10953 TWIN HARBOUR DRIVE
KNOXVILLE, TN 37934

April 26, 2010

President Barack Hussein Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Via: Norm Eisen, White House Special Counsel for Ethics and Government Reform

Subject: Dreams for my Profession of Engineering and the Audacity of Hope

Dear President Obama,

By dint of 18 years of sacrifice, risk, loss and tremendous exertion to uphold, defend and advance my profession of engineering, its code of ethics, and the public health and safety (together with the "merit system principles" of the federal civil service) as a licensed professional engineer (PE) employed by the U.S. Department of Energy as nuclear safety engineer, I am now an influential member of mankind largest and most global profession of engineering whose 20 million degreed members worldwide collectively held civilization and much of the natural environment in the hands. I have also become an influential member of the federal civil service, whose 2 million members have vital responsibilities for America's safety, security and welfare.

What did I do? I "blew whistles," about serious workplace safety and health issues in the Department of Energy (DOE), after they were suppressed by my management, per my positive legal and professional duty as a PE. Then I defended, vigorously, my

"right" to do my duty to protect others, via rule of law. This now has me, pro se, in front of the Supreme Court, in *Carson v. Merit Systems Protection Board*, docket no. 09-1207.

Why? Ultimately because my Christian worldview informs me that mankind is God's "creation-caring for creature" on planet earth, with stewardship responsibilities for the planet and its inhabitants, particularly other men. It also informs me that "suffering for righteousness' sake" is not necessarily to be shunned, that it can be a privilege of a sort (while it remains suffering nonetheless). This is because it results from a moral choice, while most suffering comes unbidden, and because there is a possibility of tangible moral and embodied good coming from such suffering. Suffering for righteousness' sake is just part of moral fabric of universe, a necessary part of confronting and controlling evil, particularly institutional evil. But it both requires – and witnesses to – "an audacity for hope."

Please let me be clear – the most "unfair" thing about my life is how "unfairly fair" life has been to me, compared to so many others – now and in history. I am named for a NYC fireman, my grandfather; I watched the erection of the WTC when walking to the subway to go to High School, Brooklyn Prep. I had a scholarship to Brooklyn Prep, was offered a number of academic and athletic scholarships to college, was hand-selected by Admiral Rickover to be a nuclear officer, served on nuclear submarines, made a lot of money as a contract engineer at several commercial

nuclear power plants in 1980's, have been married 25 years, have 3 loving and capable children, and a sustaining faith.

But I also have a picture over my desk of Fireman Peter Bielfeld, the only casualty from Ladder Co. 42 on 9/11. My grandfather served at Ladder Co. 42 for 20 years, it is on Prospect Avenue in the Bronx. On 9/11, Fireman Bielfeld was home on disability leave. Despite that, he self-deployed to the WTC, where he died. He made a choice to do his duty when no one would have said anything had he not shown up. Please test my claims – that I made a choice to do my duty – despite incurring significant personal and professional costs – when no one would have said anything had I "looked the other way."

Requested Direction to the Solicitor General, Per Your Campaign Pledge to Support Federal Whistleblowers

Shortly after my petition for certiorari to the Supreme Court in *Carson v. Merit Systems Protection Board*, no. 09-1207, was docketed on April 6, 2010, I made a request to Mr. Eisen, the Secretary of Energy, the Chair of the Merit Systems Protection Board, and the Solicitor General, that the Solicitor General file a response in acquiescence. If this happened, the statistical chances of the Supreme Court granting my petition would rise from about 1 in 500 to over 70%. On April 14, the Solicitor General filed a notice of waiver with the Supreme Court, meaning it will not

file a response, unless directed by the Supreme Court. I understand the Solicitor General files such waivers about 85% of the time.

I respectfully request you to direct the Solicitor General to withdraw the waiver and file a response in acquiescence. It has until May 6, 2010 to do so. I seek the Supreme Court to vacate the decision and remand the case to the US Court of Appeals for the Federal Circuit with instructions to create precedent about a 1994 amendment to the 1989 Federal Whistleblower Protection Act that was intended to significantly strengthen the protection available to federal whistleblowers. Because there is no precedent at the Federal Circuit – 16 years later – it is not doing so. Your doing this would be an unprecedented step in support of federal whistleblowers and an important step to restoring trust in America's federal civil service and federal agencies.

In attachment one to this letter are several related documents.

Substantiating or dispelling my claims of 31 years of lawbreaking at U.S. Office of Special Counsel (OSC) and U.S. Merit Systems Protection Board (MSPB)

President Obama, our Country – as civilization as a whole – faces unprecedented challenges. It must have a trustworthy federal civil service, which requires you and your agency heads ensure that federal employees are able to do their duty, ethically and competently,

per the "merit system principles," while being adequately protected from "prohibited personnel practices (PPP's), particularly reprisal (note: PPP's are, by and large, agency violations of the merit system principles").

You cannot say that, neither can your agency heads – none can apparently demonstrate compliance with their nondiscretionary duty to adequately protect their employees from PPP's – i.e. "prevent PPP's," per 5 U.S.C. §2302(c). This requirement was created in 1979 per the Civil Service Reform Act of 1978. How can my claims of 31 years of non-compliance with this vital duty – and the harm it has caused America – be considered "good news"? Well, if I am correct, then a previously unidentified significant factor for much of what has befallen America since 1979 has been identified – and it can be readily fixed. That is **good news** (at least to this engineer).

In attachment two to this letter are several related documents.

Engineering Ethics, Nuclear Terrorism, and my Profession's Role in Darfur/Sudan

I have become a recognized expert in engineering ethics. There are significant deficiencies in the scope and implementation of engineering ethics. As one specific, quite relevant to the recent summit you convened on nuclear security, my profession has yet to condemn terrorist engineers – and foiling an ingenious and

persistent terrorist nuclear engineer – was the goal of the summit.

The engineering profession's condemnation of terrorist engineers is not a panacea, but it should have happened shortly after 9/11. Bin Laden has been condemned by his family, his religion, and his Country – so why not his profession too? A number of leaders of major engineering professional societies have told me that they "lead from behind" and that if more rank and file members of those societies told them to condemn terrorist engineers, it would happen. I can assure you that "more" is not "many more," from my serving in a number of volunteer leadership positions in several major engineering societies over the years, it would probably only take 10 members of a 100,000 member professional engineering society, working together, to persuade the society's board to condemn terrorist engineers. And once one society did so, others would follow.

The conflicts in Darfur and Sudan are literally fueled by Sudanese oil. Therefore my profession is playing an enabling role in genocide, mass rape, and wanton destruction, contrary to its code of ethics and values. It should be playing a much more positive role to bringing peace, democratic rule of law based in human rights, and sustainable development to Darfur and Sudan.

President Obama, you have forgotten more than I will ever know about creating a vision for the common good and advancing it. However, should you take the

unprecedented action (at least for federal whistleblower appeals to the Supreme Court) of directing the Solicitor General to file a response in acquiescence, it will result in the federal whistleblower community embracing my cause – to expose and stop 31 years of lawbreaking at OSC and MSPB – and for leaders of the engineering profession to address my concerns about long-standing, significant deficiencies in the scope and implementation of engineering ethics.

As one result, an "A-lister" celebrity should be readily recruited to headline a short video to promote the "engineer's petition for Darfur" <www.engineersfor darfur.org>, by which engineers of all faiths and no faith, worldwide, can tell leaders of their profession to do and say more responsible things about Darfur. The petition is an unprecedented effort to advance my profession's code of ethics in unprecedented ways – and it will work (actually, it must work for my profession to play its necessary role in advancing a desirable future for mankind).

In an attachment to this letter are several related documents.

Vols4STEM and National Lab Day, Part of your "Educate to Innovate" Initiative

Since 2004 my wife, Karen, has served on the Knox County (TN) Board of Education – 56,000 students, 380 million dollars/year. She served as Board Chair for two years, during which the Board bought out the contract of the Superintendent and conducted its first

nation-wide search for a replacement. She played an essential role in the selection of Dr. Jim McIntyre as the new Superintendent in the Spring of 2008. Several weeks ago, Dr. McIntyre presented Tennessee's Race to the Top application to the Department of Education, with the Tennessee Governor, Chairs of its House and Senate Education Committees, and Commissioner of Education sitting behind him. Tennessee was awarded 500 million dollars, as you know.

In part because of Karen, in late 2006 I sought and obtained a mandate from the Knoxville chapter of the Tennessee Society of Professional Engineers (TSPE) to lead the creation of what is now Vols4STEM <www.Vols4STEM.org>. It is an unprecedented effort to facilitate the voluntary collaboration of our area's Science, Technology, Engineering and Math (STEM) professional community, STEM employers, and STEM educators to improve K-12 STEM education and workforce development, primarily by getting more STEM professionals involved, as volunteers, in STEM outreach activities to area youth. We hope to make it a national model – by which the engineering profession and its members can advance their profession's code of ethics and service to society. The STEM educators have stressed that their students would benefit by having engineers share how they honor and advance engineering ethics – including by volunteering for such educational outreach.

We are building on existing community social capital – local sections of professional societies, PTA's/PTSO's, faith communities, boys scouts, girl scouts, faith

communities and their youth service ministries, chambers of commerce, etc – in pulling this together. Recently, we placed over 500 Knox County STEM teachers with area employers as part of their in-service day, where they had a chance to ask "how is what we teach relevant to what you do?" and start creating personal connections between area employers and educators.

Because this area is a Department of Energy (DOE) host community, it has a high concentration of STEM professionals, making this an ideal area for an effort as Vols4STEM. For whatever reasons, DOE has not, to this point, given Vols4STEM a "public pat on the back." Its doing so would speed, significantly, the growth of the Vols4STEM network. I am not complaining, but there seems to be a disjoint between your "Educate to Innovate" initiative and what federal agencies with science and technology missions and field facilities perceive they can do to help foster the its objectives in their host communities via an inclusive, non-partisan, volunteer resource as Vols4 STEM.

We hope the upcoming National Lab Day <www.NationalLabDay.org> provides an opportunity to showcase what we have accomplished so far with Vols4STEM, because we designed it to work anywhere there is a significant STEM professional community.

In attachment four to this letter are several related documents.

Conclusion:

If you direct the Solicitor General to withdraw the waiver and file a response in acquiescence in my Supreme Court case, it will result in perceptible positive change – for federal whistleblowers, for the federal civil service, and the profession of engineering.

If you direct the Office of Legal Counsel to issue opinions of the contested areas of OSC and MSPB law and my concerns are substantiated, it will be very **good news for America** – a contributing cause to much that has gone wrong since 1979 has been identified and can be readily fixed.

If DOE is asked why it cannot give a public endorsement to efforts as Vols4STEM and, as a result, it is determined that it lawfully can, then the Vols4 STEM network will grow more quickly and, we hope, become a widely copied model in many communities around the Country, particularly host communities of federal facilities with STEM-related missions, advancing the objectives of National Lab Day and your "Educate to Innovate" initiative.

Thank you for whatever consideration you or members of your administration deem these requests to merit.

Respectfully,

Joe Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831 <jpcarson@tds.net>

copy:

Secretary of Energy
Chairman of MSPB
Solicitor General of United States
Other stakeholders to STEM education, engineering ethics, and Darfur/Sudan